

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF CAMPAIGN & POLITICAL FINANCE

ONE ASHBURTON PLACE, ROOM 411  
BOSTON, MASSACHUSETTS 02108  
(617) 727-8352  
(800) 462-OCPF

MICHAEL J. SULLIVAN  
DIRECTOR

May 8, 1995  
AO-95-15

William B. Vernon, Executive Director  
Massachusetts Republican Party  
114 State Street  
Boston, MA 02109

Re: Massachusetts Republican State Committee Building Fund

Dear Mr. Vernon:

This letter is in response to your recent request for an advisory opinion.

You have stated that the Massachusetts Republican State Committee (RSC) intends to establish a building fund to purchase or construct a building to serve as a new headquarters for its federal and non-federal activities.

You have also stated that you intend to use the headquarters building to influence federal and non-federal elections, but the building fund "is not created for the purpose of influencing any election." RSC intends to:

- (1) solicit and accept corporate contributions, as well as individual and PAC contributions designated for the building fund above the limits established by state and federal law;
- (2) advise all potential corporate, individual and PAC contributors that contributions will be used for the building fund;
- (3) establish a separate segregated bank account in which all contributions designated for the building fund will be deposited;
- (4) disburse all funds deposited in such account to either purchase or construct a new headquarters;
- (5) not use any funds in the account to influence any particular federal, state, or local election, or to transfer such funds to any bank account used to influence an election;
- (6) not limit, other than on a voluntary basis, the amount of contributions, individually or collectively, which are made to the building fund;
- (7) not report, other than on a voluntary basis, the contributions to the building fund; and

(8) the RSC will apply the funds only to the construction or purchase of an office facility and not to pay such ongoing costs as property taxes and assessments.

You have asked if the creation of the building fund is consistent with Massachusetts campaign finance law. You have argued that Massachusetts law is preempted by the Federal Election Campaign Act. In our opinion, however, there is no conflict between federal and state law. Therefore, the RSC may solicit and receive contributions in the manner described in your letter if the RSC complies with the restrictions discussed in this advisory opinion. In short, while the RSC may raise monies without limitation for a building fund, its state account must pay for any benefit it receives from the fund.

#### I. Massachusetts law.

The Massachusetts campaign finance law defines a "contribution" as, in part, a "contribution of money or anything of value" made to a political committee for the purpose of influencing a nomination or an election. See M.G.L. c. 55, s. 1. Although you have stated that the building fund "is not created for the purpose of influencing any election," given the purpose of a political party committee, which is to support the party's candidates, such funds must be considered "contributions" even if not given with the intent that they be used to influence the election of a specific candidate. The funds would be given to further the interest of the party committee, i.e., the influencing of elections and the supporting of the party's candidates. Therefore, the funds given to the building fund would be considered contributions under Massachusetts law. In contrast to the federal statute, M.G.L. c. 55, "comprehensive legislation . . . intended to reach all political fund raising and expenditures within the Commonwealth," Anderson v. City of Boston, 376 Mass. 178, 186 (1978), does not exclude funds given to allow a political party committee to build a new headquarters from the definition of "contribution."

The potentially unlimited use of corporate funds to support a political party's state-related campaign activity is troublesome. The statute prohibits the use of corporate funds for the purpose of "aiding, promoting or antagonizing the interest of any political party." See M.G.L. c. 55, s. 8. As noted by the Attorney General, "[b]usiness corporations organized under Massachusetts law or doing business within the Commonwealth are precluded by that statute from directly or indirectly giving, paying, expending or contributing funds "for the purpose of aiding or promoting or antagonizing the interests of any political party." Therefore, even if the funds received from corporations are not used to "influence any election," Massachusetts law would prohibit use of the funds to "aid or promote" the Massachusetts Republican State Committee.

The prohibition against corporate funds to influence the election of candidates in Massachusetts is strictly enforced. See Opinion of the Attorney General, November 6, 1980, in which the Attorney General concluded that political committees, other than ballot question committees, may not utilize any corporate facility, such as equipment, or supplies, unless the committee compensates the corporation in an amount equal to the fair market value of what was received from the corporation. See also advisory opinions issued by the office,

including OCPF AO-94-43 (business corporations are prohibited from contributing to an organization which supports a political party), OCPF AO-93-27 (commissions received by a political committee from a corporation for services rendered by a committee to a corporation are prohibited), OCPF AO-91-12 (activities of redistricting task force undertaken to promote the interests of a state party determined to be subject to prohibition) and OCPF AO-90-32 (solicitation may not occur through an internal corporate referral system).

Massachusetts law also contains limitations on the amounts which may be contributed to political party committees by individuals and political action committees. An individual or political action committee may contribute up to \$5,000 for the benefit of the political committees of any one political party during a calendar year. See M.G.L. c. 55, ss. 6 and 7A. In addition, political action committees may make a contribution only if the contribution "enhances the principle for which the committee was organized." See M.G.L. c. 55, s. 6.

## II. Federal law.

The Federal Election Campaign Act ("FECA"), like the Massachusetts campaign finance law, generally prohibits contributions by corporations to political committees. See 2 U.S.C. section 441(b)(a). FECA, however, excludes contributions given to a building fund from the definition of "contribution." See 2 U.S.C. section 431(8)(b)(viii). Specifically, in defining "contribution," FECA excludes "any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." See also 11 CFR 100.7(b)(12).<sup>1</sup>

Where state political party committees have implemented the same restrictions which you have indicated the RSC will adopt (the eight restrictions listed on pages 1 and 2 of this opinion), the Federal Election Commission (FEC) has stated that contributions received by such committees would not be prohibited or subject to FECA's restrictions. Most recently, in FEC Advisory Opinion 1993-9 the FEC stated that "[u]nder the conditions set out, conditions indicating specific designation by the contributors for the fund and indicating that the funds will not be used for the purpose of influencing a Federal election, [a state party committee] may accept corporate donations" to a building fund . . . See FEC Advisory Opinions 1991-5 and 1986-40."

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<sup>1</sup> As previously noted, Massachusetts law defines "contribution" more broadly: a donation of funds to a political party committee which is intended to further the interests of the committee is considered a "contribution" under Massachusetts law even if not given with the intent that the funds be used to benefit a specific candidate in a particular election.

### III. Preemption.

#### A. Introduction.

The RSC has submitted a brief to OCPF in which it contends that Massachusetts laws limiting individual and PAC contributions to a building fund and prohibiting receipt of corporate contributions to be used to build the committee headquarters are preempted by federal law.<sup>2</sup> In short, the RSC has argued that even though federal law does not contain a specific provision authorizing the creation of a building fund, federal law occupies the field and any state statute or regulation which conflicts with the implied authorization of corporate contributions for such purpose must be preempted. In part, the RSC relies upon FEC opinions concluding that state laws similar to M.G.L. c. 55, s. 8 are preempted.

If federal law expressly preempts state regulation of receipts by political party committee building funds, the state could not impose restrictions on receipts by the RSC building fund, i.e., state regulation would be preempted. In addition, even if federal law does not expressly overrule state law on the issue, state law would be implicitly preempted if the "scope of the statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. [The Supreme Court] has found implied conflict preemption where it is 'impossible for a private party to comply with both state and federal requirements,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Freightliner Corp. v. Myrick, 63 U.S.L.W. 4263, 4264 (U.S. April 18, 1995 (No. 94-286) (emphasis added, citations omitted)).

For the reasons which follow, we conclude that federal and state law permit the RSC to raise funds for its new headquarters. However, we also conclude that Massachusetts law contains restrictions on contributions by individuals, PACs and corporations, made to influence the election of state candidates, and those restrictions are not inconsistent with federal law. As discussed in Section IV of this opinion, if the RSC state account makes payments to the building fund for the state campaign related use of the new building and for the use of any services from the building fund for state election activity, it is possible for the RSC to comply with both federal and state law and compliance with state law would not stand as an obstacle to the accomplishment and execution of Congressional intent underlying FECA.

#### B. The Republican State Committee's Argument.

In the FEC advisory opinions, relied upon by the RSC (issued to state party committees in Michigan, Tennessee, and West Virginia), the FEC concluded that state laws prohibiting receipt of all corporate contributions were preempted by FECA, which the FEC interpreted as

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<sup>2</sup> In addition to asking you to submit a brief, we solicited comment from the Democratic State Committee and other interested parties. In addition to your brief, written comments were received from the Commonwealth Coalition.

allowing receipt of corporate building fund donations. See FEC Advisory Opinions 1993-9, 1991-5 and 1986-40, respectively. The majority of the Commission, in each opinion, cited section 453 of the Act<sup>3</sup> which states that FECA and the regulations promulgated by the FEC "supersede and preempt any provision of State law with respect to election to Federal office." (Emphasis added).

In FEC AO 1993-9, the FEC stated that since FECA specifically addresses building fund donations and, according to the majority, "clearly permit[s] them" FECA "occupies the field." The majority stated:

Congress explicitly decided not to place restrictions upon this subject -- the cost of construction and purchase of an office facility by a national or state political party committee -- which it might otherwise have chosen to treat as election influencing activity. Because such a facility would be used, at least in part, for Federal election activity, Congress could have decided that the purchase or construction of such facility was for the purpose of influencing a Federal election. Instead, it took the affirmative step of deleting the receipt and disbursement of funds for such activity from the specific proscriptions of the Act. . .

The gist of the opinion is that the receipt of funds to purchase or construct a building to be used to influence a federal election would have been considered a "contribution" under federal law if Congress had not created the exemption.

### C. Analysis.

The Massachusetts legislature has not created a similar exemption excluding the receipt of funds to purchase or construct a building from the definition of "contribution." The lack of an exemption in the Massachusetts law does not, however, lead to the conclusion that Massachusetts law is preempted.

The Supreme Judicial Court has stated that "preemption ... is not favored, and State laws should be upheld unless a conflict with Federal law is clear." Sawash v. Suburban Welders Supply Co., 407 Mass. 311, 315 (1990). Therefore, this office is obligated to implement the Massachusetts campaign finance law, and prohibit the use of corporate funds or excess contributions from individuals or PACs to influence state elections.

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<sup>3</sup> The opinions also cite 11 CFR 108.7, which lists areas in which FECA supersedes State law. The regulation provides that FECA supersedes State law concerning "limitation on contributions and expenditures regarding Federal candidates and political committees" but does not supersede State law "providing for the (1) manner of qualifying as a candidate or political party organization; (2) the dates and places of elections; (3) voter registration, (4) prohibition of false registration; or (5) voting fraud, theft of ballots, and similar offenses, or candidate's personal financial disclosure."

The application of the Massachusetts campaign finance law would be precluded if explicitly preempted or if Congress has "occupied the field of corporate political spending, leaving no room for supplemental state regulation." Stern v. General Electric Co., 924 F.2d 472, 475 (2nd Cir. 1991). In Stern the court noted that "courts have given section 453 a narrow preemptive effect in light of its legislative history." Id., at 475, n. 3. The court determined that New York's state law limiting corporate political activity was not preempted by the Act since Congress has not "occupied the field to such an extensive degree" and the state law did not "frustrate the attainment of specific objectives that federal legislation is designed to promote." Id., at 475-476.

The FEC opinions cited above contained dissents disputing the preemption found by the majority. As summarized in the dissent to FEC AO-1993-9, signed by Vice Chairman Potter and Commissioner Elliott:

The Federal Election Campaign Act only preempts state laws that are written "with respect to election to Federal office." 2 U.S.C. section 453. By statutory definition, building funds are "not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." 2 U.S.C. section 431(8)(b)(viii). Furthermore, the state party headquarters will be used by the state party in connection with state activity: activity which the FECA leaves almost entirely within the control of state law.

We do not believe that the Act's mere mention of building funds at section 431(8)(B)(viii) causes state laws to be preempted. Just the opposite, that section only exempts from the federal definition of "contribution" and "expenditure" donations to building funds. As Commissioner Josefiak stated in his Dissenting Opinions to Advisory Opinions 1991-5 and 1986-40, "by its very language and statutory context, the building fund provision is an exception and a limit to FECA jurisdiction, not an extension of it." Thus, a federal committee may accept corporate contributions to its building fund. However, the building fund exemption does not preempt state contribution limits on building funds of state committees: the FECA leaves that jurisdiction to the States.

The dissent is persuasive. We agree with its conclusion that the building fund provision does not preempt state limits on receipts by the building fund, at least to the extent that the limits apply only to state campaign activities. Moreover, to read 11 U.S.C. section 431(8)(B) in the manner suggested by the FEC majority would arguably lead to exclusive federal jurisdiction, plainly not intended by Congress, over certain matters excluded by FECA from the definition of "contribution." For example, section 431(8)(B)(v) excludes from the definition of "contribution" "any payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which such

committee is organized . . ." The exclusion of this kind of receipt from the definition of "contribution" in FECA cannot reasonably be understood to mean that Congress intended to preempt the regulation of such receipts from state regulation.

With these considerations in mind, if corporate or excess contributions to the building fund do not benefit the state account of the RSC in connection with the RSC's involvement in state campaign activities, the restrictions imposed by Massachusetts law do not apply, and there is no possible conflict between federal and state law and therefore no preemption. Similarly, if the state account pays the building fund the fair market value of the space and any services it receives from the fund, no "contribution" has been received by the state account and state law has not been violated.<sup>4</sup>

Requiring payment of the fair market value of space and services received by the state account does not conflict with federal law. In FEC AO-1993-9, the majority stated that ". . . there is no indication that Congress envisioned any sort of limitation on purchasing or constructing a building. See Report of the Committee on House Administration, Federal Election Campaign Act Amendments of 1979, H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 8-10 (1979) (specifically sanctioning allocation of expenses for certain exempt party activities.)" We have reviewed the Report referenced above. The Report does not reflect any consideration of the limitations discussed in this opinion. The fact that Congress did not envision the limitations required to avoid a conflict between federal and state law does not mean that the limitations are impermissible. As previously noted, preemption is not favored and must be supported by a clear statement of Congressional intent to preempt. In light of this standard, we have concluded that applying the limitations stated in this opinion does not conflict with federal law.<sup>5</sup>

Since we have concluded that there is no conflict between federal and Massachusetts law, the RSC may accept donations from corporations and individuals for the building fund without limitation and, for its federal election campaign activities, without regulation by Massachusetts. However, to ensure that the RSC's state election campaign activities do not receive a benefit from the building fund, the RSC must comply with state law as set forth below.

#### IV. Application.

If the new RSC headquarters would be used only to influence federal campaigns, state law would not be implicated, and the building

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<sup>4</sup> Regulations issued by OCPF state that a political committee must pay the fair market value of space used as an office or, if applicable, report an in-kind contribution. See 970 CMR 2.05(2)(h)(3) and 970 CMR 2.06(3).

<sup>5</sup> Compare Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993), in which the Minnesota Congressional Campaign Reform Act, which conditioned public funding upon federal candidates' voluntary agreement to abide by expenditure limitations was clearly preempted since the state law concerned limitations on contributions and expenditures of federal candidates.

fund could obtain unlimited donations from corporations and individuals, but not, as discussed below, political action committees registered with this office. However, since you have stated that the headquarters will be used for both federal and state campaign activities, state law restrictions must be applied.

To comply with Massachusetts law, which would require reimbursement for the use of office space or any service provided by a corporation and limit receipt of individual and PAC contributions, the RSC state account must make rental payments to the building fund for the state campaign related use of the new building or the receipt of any services from the building fund. The computation of the amount to be paid to the building fund depends upon whether the portion of the building or a particular service, if any, provided by the building fund, is used solely for state campaign activity, or whether the portion of the building or service is shared or jointly used for both state and federal activity.

(1) Sole use of building or services for state activity.

Where a portion of the building is used solely for state campaign activity, or a service is provided through the use of the building fund, the amount paid by the state account should equal the fair market value of that portion of the headquarters, or that portion of the services, used for state campaign activity.

(2) Shared use of building or services.

Where a particular portion of the headquarters is not used solely for state campaign purposes, but rather is used jointly for state and federal campaign purposes, the fair market rental value should be determined pursuant to the ballot composition method defined in OCPF IB-94-01.<sup>6</sup> For example, if the federal/state ballot composition allocation formula (reflected on Schedule H1 filed with the FEC) is 60% federal/40% state for a particular election cycle, then the state account should transfer 40% of the fair market value of the portion of the building which is jointly used to the building fund. The transfer should be made through the state party's depository account.<sup>7</sup>

Regardless of whether the building is used for solely federal campaign purposes, or both federal and state campaign purposes, political action committees registered with this office would be

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<sup>6</sup> The bulletin specifies that state party committees must pay at least the minimum amount of the state share of a joint expense based upon the appropriate federal allocation formula as set forth in the bulletin. Payment must be made from funds in the state party committee's state depository account. For shared federal and non-federal administrative expenses and generic voter drive costs, state party committees were advised to utilize the ballot composition method defined in 11 CFR 106.5(d)(1)(ii). Although state law does not mandate use of the ballot composition allocation formula, the formula is a reasonable method of determining the appropriate allocation of expenses for jointly used space.

<sup>7</sup> As noted in OCPF IB-94-01, the ballot composition allocation formula changes with each election cycle.




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subject to section 6 of M.G.L. c. 55. Section 6 prohibits political action committees registered in Massachusetts from making any expenditures not consistent with the principle for which the committee was organized and establishes limits on expenditures which may be made by political action committees. See OCPF IB-82-01.

Please do not hesitate to contact this office should you have additional questions.<sup>8</sup>

Sincerely,

  
Michael J. Sullivan  
Director

MJS/cp

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<sup>8</sup> We assume that the building fund will remain in existence indefinitely. You have not asked for guidance regarding post-construction/purchase proceeds received by the building fund or the RSC as a result of constructing or purchasing the building. In general, however, you should note that anything of value received through the use of the building fund cannot be used directly or indirectly to support the RSC state account.